LEE LAN

v.

LIM YOON LOY & ORS.

SUPREME COURT, KUALA LUMPUR
HARUN HASHIM SCJ
MOHD. YUSOF MOHAMED SCJ
GUNN CHIT TUAN SCJ
[SC CIVIL APPEAL NO. 04-6-1990]
26 SEPTEMBER 1991

CIVIL PROCEDURE: *Notice of appeal not served on respondents - Extension of time to serve appeal - Time period within which appeal should be served - Court in which application for extension of time should be made - Courts of Judicature Act 1964, s. 8 and Schedule - Rules of the High Court 1980, O. 3 r. 5 - Subordinate Courts Rules 1980, O. 49 rr. 2(3)(6).*

The appellant's claim for delivery of vacant possession of certain land against the respondents was allowed in the Magistrate's Court in Tapah on 25 November 1984. The respondents appealed to the High Court at Ipoh on the same day. However, the notice of appeal was not served on the appellant. On 15 February 1984, the respondents' application for stay of execution pending appeal was refused by the learned Magistrate. On 5 June 1984 the respondents applied to the High Court for stay of execution of the Magistrate's order pending the disposal of the appeal. This application was allowed on 29 June 1984. However as the respondents failed to pay a deposit of RM250 towards the costs of the appeal despite repeated requests, the Magistrate notified the respondents' solicitors that the appeal was deemed to be withdrawn. On 23 January 1990 the respondents applied to the High Court for extension of time to serve the notice of appeal on the appellant. The learned Judge allowed the application on 2 February 1990. Hence, this appeal by the appellants.

The following procedural issues were raised, *inter alia*, mode of service of documents, nature of documents to be served by appellants on the respondents, time for service of such documents and the Court in which an application for extension of time to serve a notice of appeal should be made.

Held:

[1] In the instant case, the documents which were served on 20 June 1984 on the appellant was the originating motion under the provisions of the Rules of the High Court 1980. There was accordingly no service of the notice of appeal as required under the Subordinate Courts Rules, Subordinate Courts Rules (SRC) O. 49 to bring the appeal into existence.

[2] The notice of appeal to be served on the respondent under SCR O. 49 r. 2(6) must show the date on which the notice of appeal was filed in the Court appealed from. This will show the respondent that SCR O. 49 r. 2(3) had been complied with.

[3] For the purposes of the present appeal the relevant rule of the SCR applicable at the material time was the 1981 amendment which in effect repeats r. 2(6) of the 1950 Rules as amended in 1985. Sub-rules (1), (3) and (6) of r. 2 of O. 39, when read together, provide that an appeal from the decision of a Subordinate Court must be brought by way of a notice of an appeal in Form 39, which must be filed in that Court within 14 days from the day on which the decision was pronounced and served on all the parties affected by the appeal or their respective solicitors. An appeal cannot come into existence without the notice of appeal being filed in Court, as well as a copy of it being served on the respondent within the

prescribed period. The two acts cannot be done simultaneously, but they must be done within the same period. The time limited to serve the notice of appeal on the respondents in the instant appeal therefore is 14 days from 25 January 1984.

[4] As the time prescribed for filing and service of the notice of appeal "is required or authorised by these rules," that is, O. 49 SCR, it follows that the proper forum to apply for extension of time is the Court appealed from, *viz* the Magistrate's Court in this instance. As between solicitors, in the interests of their clients, time and costs resort should be made to sub-rule (3) as standard practice if the omission to file or serve is within a reasonable period of time, or where the circumstances are such that it would not prejudice the other party or to prevent injustice.

[5] However, the application for extension of time could also be properly made to the High Court as the High Court has the necessary power under s. 8 of the Schedule to the Courts of Judicature Act 1964. There was accordingly a proper application before the High Court in this instance.

[6] The failure by the respondents' solicitors to serve a copy of the notice of appeal on the appellant was a mistake which was not rectified. Further the subsequent solicitors did not apply for extension of time to serve the notice until nearly 6 years after the event. The High Court should not have granted the stay pending the hearing of the appeal because in law there was no appeal pending in 1984 as no appeal had come into existence as a result of failure to serve the notice of appeal on the appellant.

[7] It had not been shown that there were merits in the appeal. The grant of extension of time is discretionary to be exercised by the Judge in each particular case. There are no sufficient grounds for the Court to grant an extension of time to serve the notice of appeal.

[Appeal allowed with costs.]

[**Bahasa Malaysia** Translation of Headnotes]

PROSEDUR CIVIL: *Notis rayuan tidak diserah pada responden -Perlanjutan masa untuk menyerahkan notis rayuan - Jangkamasa untuk penyerahan notis rayuan - Mahkamah di mana permohonan untuk perlanjutan masa patut dibuat - Akta Mahkamah Kehakiman 1964, s.8 dan Jadual - Kaedah-kaedah Mahkamah Tinggi 1980, A.3 k.5 - Kaedah-kaedah Mahkamah Rendah 1980, A.49 k.42(3), (6).*

Tuntutan perayu untuk milikan kosong bagi tanah tertentu terhadap responden telah dibenarkan di Mahkamah Majistret di Tapah pada 25 November 1984. Responden telah membuat satu rayuan kepada Mahkamah Tinggi Ipoh pada hari yang sama. Walau bagaimanapun responden tidak menyerahkan notis rayuan tersebut pada perayu.

Pada 15 Februari 1984 permohonan responden untuk penggantungan pelaksanaan perintah Majistret sehingga rayuan diperdengarkan telah ditolak oleh Majistret.

Seterusnya pada 5 Jun 1984 responden memohon kepada Mahkamah Tinggi bagi penggantungan pelaksanaan perintah Majistret sehingga penyelesaian rayuannya. Permohonan ini telah dibenarkan pada 29 Jun 1984. Responden gagal untuk membayar wang deposit sebanyak RM250 terhadap kos rayuan walaupun beberapa peringatan dihantar; tuan Majistret telah memberitahu Peguam responden bahawa rayuan itu dianggap sebagai ditarik-balik.

Pada 23 Januari 1990 responden memohon kepada Mahkamah Tinggi untuk perlanjutan masa bagi menyerahkan notis rayuan kepada perayu. Permohonan itu dibenarkan oleh Hakim yang arif pada 20 Februari 1990. Ini adalah rayuan terhadap keputusan tersebut.

Isu-isu prosedur berikut telah dibangkitkan iaitu, *inter alia*, cara serahan dokumen-dokumen itu, jenis dokumen-dokumen yang patut diserahkan oleh perayu kepada responden, jangkamasa untuk serahan dokumen-dokumen itu serta Mahkamah di mana permohonan untuk perlanjutan masa bagi penyerahan notis rayuan itu patut dibuat.

Diputuskan:

[1] Dokumen yang telah diserahkan pada 20 Jun 1984 dalam kes ini adalah usul pemula di bawah peruntukan Kaedah-kaedah Mahkamah Tinggi 1980. Oleh sebab itu, tiada penyerahan notis rayuan yang telah dibuat seperti yang dikehendaki oleh A. 49 Kaedah-kaedah Mahkamah Rendah (KMR) bagi mewujudkan rayuan.

[2] Notis rayuan yang perlu diserahkan pada responden di bawah A.49 k.2(6) KMR 1980 mestilah menunjukkan tarikh memfailkan notis rayuan itu di Mahkamah dari mana rayuan dibuat. Ini akan menunjukkan kepada responden bahawa A. 49 k. 2(3) KMR 1980 telah dipatuhi.

[3] Bagi tujuan rayuan ini, perintah KMR yang relevan pada masa tersebut adalah pindaan 1981 yang sebenarnya mengulangi k. 2(3) dari Kaedah 1950 seperti yang dipinda pada 1985. Sub-kaedah (1),(3) dan (6) k. 2 A. 39 apabila dibaca serentak, memperuntukkan bahawa satu rayuan dari keputusan Mahkamah Rendah mesti dibuat melalui notis rayuan dalam Borang 39, yang mesti difailkan di Mahkamah itu dalam tempoh 14 hari dari tarikh pengumuman keputusan itu dan mesti diserahkan kepada semua pihak yang akan terlibat (affected) oleh rayuan itu atau Peguam pihak-pihak berkenaan. Sesuatu rayuan tidak boleh wujud tanpa notis rayuan itu difailkan terlebih dahulu di Mahkamah dan salinan notis rayuan itu mesti diserahkan kepada responden dalam jangkamasa yang ditetapkan. Kedua-duanya tidak boleh dilakukan serentak tetapi mesti dibuat dalam tempoh yang sama. Jangkamasa yang ditetapkan untuk menyerahkan notis rayuan ke atas responden dalam rayuan ini adalah 14 hari dari 25 Januari 1984.

[4] Oleh kerana jangkamasa yang ditetapkan untuk memfailkan dan menyerahkan notis rayuan "adalah dikehendaki atau dibenarkan oleh kaedah-kaedah ini," iaitu A. 49 KMR forum yang sesuai untuk membuat permohonan bagi perlanjutan masa adalah Mahkamah dari mana rayuan dibuat, yang dalam kes ini adalah Mahkamah Majistret. Berhubungan dengan pihak Peguam pula, demi kepentingan pelanggan mereka, masa dan kos, mereka patut merujuk kepada sub-kaedah (3) sebagai amalan seragam jika terdapat pengabaian dalam memfailkan atau menyerahkan notis adalah dalam tempoh masa yang munasabah, atau apabila keadaannya adalah demikian di mana ia tidak akan memudaratkan pihak yang satu lagi atau untuk mengelakkan dari terjadinya ketidak-adilan.

[5] Walau bagaimanapun permohonan untuk perlanjutan masa juga boleh dibuat kepada Mahkamah Tinggi kerana Mahkamah Tinggi mempunyai kuasa di bawah s. 8 dalam Jadual di bawah Akta Mahkamah Kehakiman 1964. Seiringan dengan itu, terdapat satu permohonan yang betul kepada Mahkamah Tinggi dalam kes ini.

[6] Kegagalan oleh Peguam pihak responden untuk menyerahkan satu salinan notis rayuan kepada perayu adalah satu kesilapan yang tidak boleh diperbaiki. Seterusnya Peguam yang baru hanya memohon untuk perlanjutan masa bagi menyerahkan notis rayuan 6 tahun selepas kejadian itu. Mahkamah Tinggi tidak sepatutnya membenarkan penggantungan belum diputuskan sehingga rayuan diperdengarkan kerana dari segi undang-undang, tiada rayuan yang (pending) dalam 1984 memandangkan kegagalan responden untuk menyerahkan notis rayuan kepada perayu.

[7] Dalam rayuan itu merit tidak dibuktikan. Pemberian perlanjutan masa adalah kuasa budibicara yang boleh digunakan oleh Hakim bergantung kepada setiap kes. Juga tiada alasan-alasan yang mencukupi bagi Mahkamah untuk membenarkan satu perlanjutan masa bagi penyerahan notis rayuan.

[Rayuan dibenarkan dengan kos.]

Cases referred to:
Liew Chee Tat v. Lok Moon & Ors. [1972] 2 MLJ 29 ***(cit)***
Ahmad bin Yahaya & Anor. v. Ahmad bin Sulaiman [1972] 2 MLJ 109 ***(cit)***
Cheah Teong Tat v. Ho Gee Seng & Ors. [1975] 2 MLJ 149 ***(foll)***
Gurbachan Singh v. Seagrott & Campbell (No. 2) [1962] MLJ 370 ***(cit)***
Hj. Mohamed bin Suboh v. Devadas [1981] 1 MLJ 136 ***(cit)***
Law Yee Wah & Anor. v. Poh Kok & Sons Realty Sdn. Bhd. [1974] 2 MLJ 29 ***(cit)***

Legislation referred to:
Rules of the High Court 1980, O. 3 r. 5
Subordinate Courts Rules 1980, O. 49 rr. 2(3),(6)
Subordinate Court Rules 1950, O. XXXIX rr. 2(3),(4)

For the appellant - V.S. Viswanathan; M/s. Kean Chye & Sivalingam
For the respondents - Gurbachan Singh; M/s. Bachan & Kartar

JUDGMENT

Harun Hashim SCJ:

This was a claim for delivery of vacant possession in the Magistrate's Court at Tapah. The learned Magistrate allowed the claim on 25 January 1984. The defendants being dissatisfied with the decision appealed to the High Court at Ipoh. The notice of appeal was filed in the Magistrate's Court on the same day (25 January 1984) but it was not served on the plaintiff.

The defendants then applied to the Magistrate for stay of execution but this was refused on 15 February 1984. The defendants then changed solicitors on 21 May 1984.

On 5 June 1984, the defendants applied to the High Court for stay of execution of the Magistrate's order pending the disposal of the appeal. This was allowed by the High Court on 29 June 1984 after an *inter partes* hearing.

By letter dated 12 July 1989 the Magistrate asked the solicitors for the defendants to pay a deposit of RM250 towards the costs of the appeal. This letter was copied to the plaintiff's solicitors. The defendants' solicitors by registered letter dated 17 July 1989 to the first defendant requested him to deposit RM250 into Court. However, this letter did not reach the first defendant. By letter dated 15 September 1989, the Magistrate wrote again to the defendants' solicitors asking them to pay the deposit of RM250 plus another RM180.40 sen for costs of preparing the appeal record. The first defendant was not aware of this letter as he was away in Kuala Lumpur until he returned to Tapah in November 1989. By this time, the Magistrate had notified the defendants' solicitors that the appeal was deemed to have been withdrawn for having failed to pay into Court the RM250.

Consequently, the plaintiff's solicitors by letter dated 4 December 1989 to the defendants' solicitors demanded compliance with the judgment of 25 January 1984 within 14 days. The defendants' solicitors then wrote to the defendants by letter dated 14 December 1989 to ask them to deliver vacant possession. Upon receipt of that letter on 18 December 1989, the first defendant immediately deposited RM250 with his solicitors.

The defendants then on 23 January 1990 applied to the High Court for extension of time to serve the notice of appeal on the plaintiff. The learned Judge allowed the application on 2 February 1990. Hence this appeal by the plaintiff.

This appeal raises several procedural issues.

Mode of service

It was contended that the inclusion of a copy of the notice of appeal in the application to the High Court for stay of execution of the Magistrate's order of 25 January 1984 and served on the respondent on 20 June 1984 is deemed good service on the respondent. We think not. Order 49 r. 2(6) of the Subordinate Court Rules 1980 (SCR) provides that:

> ..the notice of appeal shall be served by the appellant on all parties directly affected by the appeal or their respective solicitors.

In the instant case, what was served on 20 June 1984 was the originating motion under the provisions of the Rules of the High Court 1980 (RHC). There was accordingly no service of the notice of appeal under SCR O. 49 to bring an appeal into existence: *Gurbachan Singh v. Seagrott & Campbell (No. 2)* [1962] MLJ 370.

What to serve

SCR O. 49 r. 2(3) provides that the notice of appeal shall be filed within 14 days from the day on which the decision was pronounced. It follows that the notice of appeal to be served on the respondent under SCR O. 49 r. 2(6) must show the date on which the notice of appeal was filed in the Court appealed from. This will show the respondent that SCR O. 49 r. 2(3) has been complied with.

When to serve

It was contended that under the Subordinate Court Rules, no time limit has been prescribed and therefore the notice of appeal can be served on the respondents at any time. There is a historical background for this contention.

The Subordinate Court Rules 1950 provided:

O. XXXIX

> Rule 2(3) The notice of appeal shall be intituled and filed in the proceedings in which the decision appealed from was pronounced, and shall be filed within fourteen days from the day on which such decision was pronounced.
>
> Rule 2(4) The notice of appeal shall be served by the appellant on all parties directly affected by the appeal or their solicitors respectively. It shall not be necessary to serve parties not so affected.

The 1950 Rules were amended in 1955 to read:

> Rule 2(3) The notice of appeal shall be filed within 14 days from the day on which such decision was pronounced.
>
> Rule 2(6) The notice of appeal shall be served by the appellant on all parties directly affected by the appeal or their respective solicitors. It shall not be necessary to serve the parties not so affected.

Rule 2(6) was considered by the Courts in the following cases:

In *Liew Chee Tat v. Lok Moon & Ors.* [1972] 2 MLJ 29, the notice of appeal was filed within three days of the decision but was served on the respondent one month and seven days after the last day prescribed for filing it in Court. It was there held in the High Court that although no time limit is prescribed to serve the notice of appeal on the respondents, it had to be served within 14 days thus reversing an earlier decision of the same learned Judge in

The New India Assurance Co. Ltd. v. Karam Singh (unreported) where he had held that service on the respondent 14 days after the time limited to file the appeal was good service because it had been served within a reasonable period of time.

In *Ahmad bin Yahaya & Anor. v. Ahmad bin Sulaiman* [1972] 2 MLJ 109, it was held in the High Court that although sub-rule (6) does not expressly provide a time limit to serve the notice of appeal on the respondent, it is part of r. 2 which has to be complied with before the Court is bound to prepare the appeal records under r. 3 and therefore the notice of appeal has to be served on the respondent within 14 days.

In *Law Yee Wah & Anor. v. Poh Koh & Sons Realty Sdn. Bhd.* [1974] 2 MLJ 29 the High Court held that it was open to the appellant to serve the notice of appeal on the respondent within a reasonable time and therefore service of the notice 25 days after the 14 days period was sufficiently speedy and that an application for an extension of time for such service was unnecessary.

In *Cheah Teong Tat v. Ho Gee Seng & Ors.* [1975] 2 MLJ 149 the appellant had filed the notice of appeal in time but did not serve a copy of such notice on the respondents or their solicitors. The appellant subsequently applied for extension of time to serve the notice of appeal but this was dismissed in the High Court. On appeal, the Federal Court considered *Liew Chee Tat; Ahmad bin Yahaya; Law Yee Wah* and other cases and at p. 151 held:

> In my judgment, r. 2(6) of O. 39 should not be read in isolation but in conjunction with r. 2(3). It must also be read together with Form 39 as prescribed by r. 2(1), which, as I have pointed out, is addressed to the Court appealed from and the respondent or respondents. Sub-rules (1), (3) and (6) of r. 2 of O. 39, when read together, provide that an appeal from the decision of a Subordinate Court must be brought by way of a notice of an appeal in Form 39, which must be filed in that Court within 14 days from the day on which the decision was pronounced and served on all the parties affected by the appeal or their respective solicitors. I do not think an appeal can come into existence without the notice of appeal being filed in Court, as well as a copy of it being served on the respondent within the prescribed period. I agree that the two acts cannot be done simultaneously, but I am of the opinion that they must be done within the same period.

The 1950 Rules were repealed and replaced by the Subordinate Courts Rules 1980 which provided:

Order 49 r. 1(5) The notice of appeal must be served on all parties to the proceedings who are directly affected by the appeal or their solicitors respectively at the time of filing the notice of appeal.

Rule 2 Every notice of appeal must be filed and served under r. 1(5) within 14 days calculated from the date on which the judgment or order of the Court was given or made.

This rule was amended on 1 April 1981 to read:

Rule 2(1) Appeals to the High Court shall be brought by giving notice of appeal in Form 140.

(3) The notice of appeal shall be filed within 14 days from the day on which the decision was pronounced.

(6) The notice of appeal shall be served by the appellant on all parties directly affected by the appeal or their respective solicitors. It shall not be necessary to serve parties not so affected.

The rule was again amended in 1987 to read:

> Rule 2(1) Appeals to the High Court shall be brought by giving notice of appeal in Form 140. A copy of such notice of appeal with the date filed endorsed thereon shall be sent by the Registrar to the Registrar of the High Court.

The rule at present in force was amended in 1991 to read:

> Rule 2(6) The notice of appeal shall be served by the appellant **within the time limited for the filing of appeal** on all parties directly affected by the appeal or their respective solicitors. It shall not be necessary to serve parties not so affected.

The 1991 amendment has now put the position beyond dispute. The correct procedure then is this:

(a) First file the notice of appeal in the Court appealed from within 14 days from date of the decision.

(b) Next, serve a copy of the notice of appeal showing the date on which it was filed in Court, on the respondent or his solicitor, also within 14 days from date of the decision.

For the purposes of the present appeal the relevant rule applicable at the material time is the 1981 amendment, which in effect repeats r. 2(6) of the 1950 Rules as amended in 1955. It follows that the Federal Court decision in *Cheah Teong Tat* is the authority by which the Courts below are bound. With respect, we are in entire agreement with that decision. The time limited to serve the notice of appeal on the respondents in the instant appeal therefore is 14 days from 25 January 1984.

Extension of Time

Where to apply

In the instant case, the application for extension of time to serve the notice of appeal was made to the High Court. It was contended that the application should first be made to the Magistrate's Court. We agree.

SCR O. 3 r. 5 provides:

> (1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these rules, or by any judgment, order or direction, to do any act in any proceedings.
>
> (2) The Court may extend any such period as is referred to in para. (1) although the application for extension is not made until after the expiration of that period.
>
> (3) The period within which a person is required by these rules, or by any order or direction, to serve, file or amend any pleading or other document may be extended by consent (given in writing) without an order of the Court being made for that purpose.

As the time prescribed for filing and service of the notice of appeal "is required or authorised **by these rules**, that is, SCR O. 49 it follows that the proper forum to apply for extension of time is the Court appealed from, *viz*. the Magistrate's Court in this instance.

We would pause to observe, particularly as between solicitors, in the interests of their clients, time and costs that resort should be made to sub-rule (3) as standard practice if the omission to file or serve is within a reasonable period of time, or where the circumstances are such that it would not prejudice the other party or to prevent injustice.

We are of the view, however, that the application for extension of time, could also be properly made to the High Court as the High Court has the power, not under RHC O. 3 r. 5 because that provision is limited to matters prescribed by the Rules of the High Court (and the time prescribed to serve a notice of appeal from a Magistrate's Court arises under the Subordinate Court Rules) but under s. 8 of the Schedule to the Courts of Judicature Act 1964. We would nonetheless, discourage such a practice because of the higher costs in the High Court and unnecessary clogging of the High Court calendar. Be that as it may, there was accordingly a proper application before the High Court in this instance.

Grant of extension

The grant of extension of time is discretionary to be exercised by the Judge in each particular case. In the instant case, the learned Judge took into account the following matters as appear in his judgment:

(a) the notice of appeal against the decision of the Tapah Magistrate on 25 January 1984 had been filed on the same day;

(b) both the Tapah Magistrate and the Ipoh High Court had informed the parties of the appeal on 29 (January) and 28 February 1984 respectively;

(c) there had been two applications for stay of execution pending the appeal before the Tapah Magistrate on 15 February 1984 when it was refused and before the Ipoh High Court on 29 June 1984 when it was allowed.

(d) the respondent was aware of the appeal all along and had made no objections to the fact that the notice had not been served on her or her solicitors even at the arguments for the stay on both occasions.

The defendants were represented by solicitors throughout these proceedings right from the Magistrate's Court. The failure to serve a copy of the notice of appeal on the plaintiff was obviously a mistake of the defendants' then solicitors. Instead of rectifying the mistake, the defendants changed solicitors. The subsequent solicitors did not apply for extension of time to serve the notice until nearly six years after the event and that too after it was raised by the plaintiff's solicitors. Indeed this omission had been overlooked by everyone concerned. If that had not been so, the High Court would not have granted the stay pending the hearing of the appeal because in law there was no appeal pending in 1984 for the simple reason that no appeal had come into existence then on account of the failure to serve the notice of appeal on the plaintiff. On this ground, the application for stay should have been refused.

It has not been shown that there are merits in the appeal. Finally, there is no explanation why the first defendant had lost touch with Tapah for four years when he was only in Kuala Lumpur but immediately sprang to life when his solicitors advised him that he had to deliver vacant possession within 14 days. We are therefore of the view that there are no sufficient grounds for the Court to grant an extension of time to serve the notice of appeal in the circumstances of this case: see *Hj. Mohamed bin Suboh v. Devadas* [1981] 1 MLJ 136 FC.

For the reasons stated, we allow the appeal with costs here and below. The order of the High Court is set aside. Deposit to be refunded to the appellant.

Also found at [1991] 3 CLJ 2393